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In the Supreme Court of the United States

OCTOBER TERM, 1977

CHRISTIANSBURG GARMENT COMPANY, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4–A to 13–A) is reported at 550 F. 2d 949. The district court's order denying the award of attorney's fees (Pet. App. 1–A to 3–A) is not officially reported, but is unofficially reported at 12 FEP Cases 533. The order of the district court granting summary judgment is reported at 376 F. Supp. 1067.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1977. The petition for a writ of

certiorari was filed on April 9, 1977, and was granted on June 20, 1977. The jurisdicton of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court abused its discretion under Title VII in declining to award attorneys' fees to a prevailing defendant in an enforcement action brought in good faith by the Equal Employment Opportunity Commission.

STATUTE INVOLVED

Section 706(k) of Title VII, Civil Rights Act of 1964, 78 Stat. 259, 42 U.S.C. 2000e–5(k), provides:

> In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

STATEMENT

In 1968 Rosa Helm filed a charge with the Equal Employment Opportunity Commission alleging racial discrimination by Christiansburg Garment Company with respect to a layoff.[1] After an investigation and a reasonable cause determination, the Commission initiated conciliation. Conciliation failed and the Commission notified Ms. Helm on July 1, 1970, of her

[1] The facts of this case are set forth in the opinion of the court of appeals (Pet. App. 5–A to 6–A).

right to file suit in federal court. Ms. Helm, however, did not exercise her option to initiate litigation.

On March 24, 1972, the 1972 amendments to the Civil Rights Act of 1964 became effective, authorizing the Commission to sue in its own name to secure compliance with the Act. Section 14 of the Equal Employment Opportunity Act of 1972, 86 Stat. 113, made the Commission's authority applicable to "charges pending with the Commission on the date of enactment of this Act and all charges thereafter." Basing its jurisdiction on the Rosa Helm charge, the Commission filed suit on January 25, 1975, in the Western District of Virginia against Christiansburg Garment Company alleging that the company had discriminated, and continued to discriminate, against black employees in violation of Section 703(a) of Title VII, 78 Stat. 255, 42 U.S.C. 2000e–2(a). Petitioner moved for summary judgment claiming that the suit was barred by the 180-day provision in Section 706(f)(1), as amended, 42 U.S.C. (Supp. V) 2000e–5(f)(1), that the suit was barred by the two-year state statute of limitations for personal injuries, and that the charge on which the suit was based was not "pending" before the Commission when the 1972 Amendments to Title VII authorizing Commission litigation took effect (Pet. App. 1–A to 2–A). The district court rejected the first two arguments but granted defendant's motion for summary judgment on the third issue. The Commission did not appeal.

On February 1, 1975, more than nine months after the district court's order granting summary judgment,

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Christiansburg filed a petition for an award of attorney's fees pursuant to Section 706(k) of Title VII. On July 28, 1975, the district court denied the company's petition, stating (Pet. App. 2–A to 3–A):

> Although petitioner prevailed on its motion for summary judgment, the Commission's action in bringing the suit cannot be characterized as unreasonable or meritless. Of the three grounds raised by petitioner in support of its motion for summary judgment, this court ruled in favor of the Commission on two of the grounds. But more importantly, the basis upon which petitioner prevailed was an issue of first impression requiring judicial resolution. The Commission's statutory interpretation of § 14 of the 1972 amendments was not frivolous, and the court has no doubt this suit represented a good faith effort by the Commission to vigorously pursue the duties assigned to it by Congress under Title VII. In such circumstances the court does not believe that an award of attorney's fees against the Commission is justified.

On appeal, the court of appeals, with one judge dissenting, upheld the district court's denial of attorney's fees (Pet. App. 4–A to 13–A). Recognizing that the "policy considerations which support the award of fees to a prevailing plaintiff are not present in the case of a prevailing defendant" (*id.* at 7–A), the court of appeals approved the standard which had been applied by the district court—that an award of attorney's fes against the Commission would be appropriate only when the Commission acted in "bad faith" (*id.* at 9–A).

SUMMARY OF ARGUMENT

1. Normally attorney's fees are not awarded to successful parties to a lawsuit; prevailing defendants like prevailing plaintiffs must ordinarily absorb their attorney's fee costs. *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240. Congress has provided limited exceptions to this so-called American rule, utilizing statutes that frequently require the exercise of discretion by the district court in deciding whether to shift the normal fee burdens. Section 706(k), 42 U.S.C. 2000e–5(k), which provides that "the court, in it discretion, may allow the prevailing party * * * a reasonable attorney's fee," is by its terms one such permissive grant of statutory authority to award fees in the discretion of the district court. The congressional choice of permissive and discretionary language indicates that the statute does not require a mechanical award of fees in all cases to all prevailing parties, but mandates instead that the court exercise judgment in determining which prevailing parties in which circumstances should obtain a fee award.

The authority of the district courts under statutes requiring such use of discretion must be exercised with close reference to the goals of the particular legislative scheme. *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 416; *Hecht Co.* v. *Bowles,* 321 U.S. 321. The "circumstances under which attorney's fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine." *Alyeska Pipeline Service Co.* v. *Wilderness Society, supra,* 421 U.S. at 262. In reviewing fee

award standards under fee provisions worded identically to Section 706(k), this Court has therefore looked to the pertinent legislative history and the functions of the fee award in implementing the larger goals of the statutory scheme. See *Newman v. Piggie Park Enterprises,* 390 U.S. 400. The question is not one of abstract fairness, or of the generally equitable distribution of litigation burdens, but more precisely whether the fee standard "properly effectuates the purposes of the counsel-fee provision" (*id,* at 401).

2. In *Newman* v. *Piggie Park Enterprises, supra,* this Court recognized that private litigation is a crucial element in the congressional scheme for enforcement of the civil rights laws. Reviewing standards for a fee award under the pertinent provision of Title II of the Civil Rights Act of 1964, 78 Stat. 244 (42 U.S.C. 2000a–3(b)) which the language of Section 706 (k) exactly tracks, this Court concluded that the primary purpose of the statute in encouraging enforcement by "private attorneys general" required that prevailing plaintiffs "should ordinarily recover an attorney's fee, unless special circumstances would render an award unjust" (390 U.S. at 402). While the legislative history of Section 706(k) is sparse, it indicates that the role of that Section in Title VII of the Civil Rights Act was not intended to be different from the function of the identical fee provisions in Title II to support the efforts of private attorneys general by "mak[ing] it easier for a plaintiff of limited means to bring a meritorious suit" (110 Cong. Rec. 12724 (1964). See *Albemarle Paper Co.* v. *Moody,*

422 U.S. 405, 415; *Johnson* v. *Georgia Highway Express, Inc.,* 488 F. 2d 714, 716 (C.A. 5).

Petitioners and *amici* argue that under *Newman,* fees should ordinarily be awarded to prevailing defendants. But this Court in *Newman* did not purport to establish a standard applicable to both plaintiffs and defendants and the rationale of *Newman* simply does not apply to awards to defendants; the "prevailing defendant seeking an attorney's fee does not appear before the court cloaked in a mantle of public interest." *United States Steel Corporation* v. *United States,* 519 F. 2d 359, 364 (C.A. 3). A successful defendant does not act as a "private attorney general," and does not vindicate the Title VII policy prohibiting employment discrimination. As the court of appeals stated, the congressional policy considerations which suport an award of fees to a prevailing plaintiff "are not present in the case of a prevailing defendant" (Pet. App. 7–A).

3. Since Congress plainly intended that fee awards be available to defendants, the rationale for such awards must come from the second purpose of the Section 706(k) authorization, which, as the legislative history explicitly reveals was "to discourage frivolous suits." 110 Cong. Rec. 14214 (1964); see *Grubbs* v. *Butz,* 548 F. 2d 973, 975 (C.A.D.C.). In order to serve this statutory goal of penalizing frivolous litigation without chilling the efforts of private attorneys general, the courts have applied a "good faith" standard under which fees are awarded to a defendant "not routinely, not simply because he succeeds, but only where

the action brought is found to be unreasonable, frivolous, meritless or vexatious." *Carrion* v. *Yeshiva University,* 535 F. 2d 722, 727 (C.A. 2). The same standard has been applied to fee requests by successful Title VII defendants whether the suit was initiated by a federal enforcement agency or by private parties, and the courts exercise their discretion thereunder in light of the entire factual and legal fabric of the litigation including both subjective and objective factors. For example, in the instant case, the court of appeals affirmed the finding of good faith only after assuring itself that the issue litigated by the Commission unsuccessfully was one "of first impression requiring judicial resolution" (Pet App. 9–A), and after the district court had found the Commission's suit to be neither "unreasonable or meritless" (Pet. App. 2–A). This application of the "good faith" standard fully implements the congressional goals "to encourage responsible litigation but to discourage baseless or frivolous actions." *Carrion* v. *Yeshiva University, supra,* 535 F. 2d at 727.

4. The suggestion by petitioner and *amici* that public policy requires that prevailing defendants ordinarily be awarded fees is not only inconsistent with the private attorneys general rationale, it would thwart the primary enforcement incentive purpose of Section 706(k) by "effectively discourag[ing] suits in all but the clearest cases, and inhibit[ing] earnest advocacy on undecided issues." *United States Steel Corporation* v. *United States, supra,* 519 F. 2d at 364–365. As applied to suits initiated by the Equal Employment Opportunity Commission, fee awards

resulting from good faith but unsuccessful litigation would drain Commission resources that Congress recognized were limited in comparison with the Commission's statutory responsibilities. See *Occidental Life Insurance Co.* v. *Equal Employment Opportunity Commission,* No. 76–99, decided June 20, 1977, slip op., p. 9. Equality of treatment does not require that the Commission ordinarily pay fees to successful defendants because under Section 706(k) the Commission is explicitly precluded from obtaining a fee award when it emerges as a successful plaintiff. Finally, the claim that the language of Section 706(k) requires that fees ordinarily be awarded to successful defendants is inconsistent with Congress's subsequent use of similar language accompanied by explicit congressional adoption of the standards applied by the court of appeals below. S. Rep. No. 94–1011, 94th Cong., 2d Sess., pp. 4–5 (1976); H.R. Rep. No. 94–1558, 94th Cong., 2d Sess., pp. 6–7 (1976).

ARGUMENT

THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN DECLINING TO AWARD ATTORNEY'S FEES TO A PREVAILING DEFENDANT IN A TITLE VII ENFORCEMENT ACTION BROUGHT IN GOOD FAITH BY THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION.

A. SECTION 706(k) REQUIRES A DISTRICT COURT TO EXERCISE ITS DISCRETION IN LIGHT OF THE PURPOSES OF TITLE VII AND THE LEGISLATIVE HISTORY OF THE FEE AWARD STATUTE IN ORDER TO DETERMINE WHETHER A PARTICULAR PREVAILING PARTY SHOULD BE AWARDED ATTORNEY'S FEES.

The long established and recently reaffirmed American rule is that attorney's fees generated by

litigation are not normally recoverable as costs by the prevailing party in a lawsuit. *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240. Fees are not ordinarily awarded to a successful plaintiff, and, in the absence of legislation providing for fee awards, prevailing defendants must also absorb what may sometimes be the enormous costs of litigation initiated against them. That the unsuccessful litigation is initiated by a government agency against a private defendant does not alter the rule that each party must bear its own fee costs.[2] While the American rule has been much criticized,[3] Congress has provided only limited exceptions "under selected statutes granting or protecting various federal rights." *Alyeska Pipeline Service Co.* v. *Wilderness Society, supra,* 421 U.S. at 260.

Congress has drafted its fee award statutes with varying degrees of specificity. Some statutes make fee awards mandatory;[4] others restrict awards to par-

[2] This Court has recognized a number of equitable exceptions to the American rule (see *Alyeska Pipeline Service Co.* v. *Wilderness Society, supra,* 421 U.S. at 257–259), but the allegedly heavy burden of costs incurred by successful defense of litigation initiated by the government has never been recognized as a sufficient rationale for a fee award.

[3] See *F. D. Rich Co.* v. *Industrial Lumber Co.,* 417 U.S. 116, 128, n. 15; *Alyeska Pipeline Service Co.* v. *Wilderness Society, supra,* 421 U.S. at 270, n. 45.

[4] See, *e.g.,* the Clayton Act, 38 Stat. 731, 15 U.S.C. 15; the Fair Labor Standards Act of 1938, 52 Stat. 1069, as amended, 29 U.S.C. 216(b); the Truth in Lending Act, 82 Stat. 157, 15 U.S.C. 1640 (a); and the Merchant Marine Act of 1936, 49 Stat. 2015, 46 U.S.C. 1227.

ticular parties, usually prevailing plaintiffs.[5] Frequently the statutory mandates are less precise, permitting awards to either parties plaintiff or parties defendant and relegating the fee award decision to the discretion of the district court.[6] The authority of district courts under statutes requiring the exercise of discretion is not open ended, but must be exercised with close reference to the goals of the particular statute. *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 416; *Hecht Co.* v. *Bowles,* 321 U.S. 321. In reviewing fee award standards implementing these discretionary powers, this Court has looked to the pertinent legislative history and the function of the fee award in implementing the larger goals of the statutory scheme. See *Newman* v. *Piggie Park Enterprises,* 390 U.S. 400; *Northcross* v. *Memphis Board of Education,* 412 U.S. 427. Whether the language of the fee award provision is discretionary or mandatory, "the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine."

[5] See, *e.g.,* the Privacy Act, 5 U.S.C. (Supp. V) 552a(g)(2)(B); Packers and Stockyards Act, 42 Stat. 165, 7 U.S.C. 210(f); Fair Housing Act of 1968, 82 Stat. 88, 42 U.S.C. 3612(c).

[6] See *e.g.,* Trust Indenture Act of 1939, 53 Stat. 1171, as added, 15 U.S.C. 77ooo(e); Securities Exchange Act of 1934, 48 Stat. 889, 15 U.S.C. 78i(e), 78r(a); Federal Water Pollution Prevention and Control Act of 1972, 86 Stat. 888, as added, 33 U.S.C. (Supp. V) 1365(d); Clean Air Act Amendments of 1970, 84 Stat. 1706, as added, 42 U.S.C. 1857h-2(d); Noise Control Act 1972, 86 Stat. 1244, 42 U.S.C. (Supp. V) 4911.

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Alyeska Pipeline Service Co. v. *Wilderness Society, supra,* 421 U.S. at 262.

Section 706(k) is by its terms a permissive grant of statutory authority to award fees in the discretion of the district court. It provides: "[T]he court, in its discretion, may allow the prevailing party * * * a reasonable attorneys fee." 42 U.S.C. 2000e–5(k). This permissive and discretionary language indicates that the statute does not require the mechanical award of fees in all cases to all prevailing parties. But the statutory language provides no further indication of which prevailing parties in which circumstances should obtain a fee award, and there is certainly no language suggesting that "a prevailing [party] defendant is entitled to an award of attorney's fees on the same basis as a prevailing plaintiff" (Pet. Br. 4; see also EEAC Br. 5; Chamber Br. 7)[7]

In the absence of any precise guidance from the statutory language, the courts have developed appropriate standards for the exercise of their discretion under Section 706(k). This Court has addressed under standards governing fee awards to plaintiffs under an identically worded fee provision, and has held that success alone ordinarily merits the award of fees to a Civil Rights Act plaintiff. *Newman* v. *Piggie Park Enterprises, supra,* 390 U.S. at 402. Petitioner claims that the same standards must apply to prevailing defendants. As this Court has indicated, however, the question is not one of abstract fairness, or of generally equitable distribution of litigation burdens, but more precisely whether the fee award standard "properly effectuates the *purposes* of the counsel-fee provision." 390 U.S. at 401 (emphasis added).

[7] "Pet. Br." refers to the Brief of the Petitioner. "EEAC Br." refers to the Brief Amicus Curiae of the Equal Employment Advisory Council. "Chamber Br." refers to the Brief for the National Chamber Litigation Center as Amicus Curiae.

B. THE AWARD OF FEES TO SUCCESSFUL PLAINTIFFS EFFECTUATES THE PRIMARY PURPOSE OF SECTION 706(k) TO PROVIDE SUPPORT FOR PRIVATE ATTORNEYS GENERAL VINDICATING THE TITLE VII PROHIBITION AGAINST EMPLOYMENT DISCRIMINATION

In *Newman* v. *Piggie Park Enterprises, supra,* this Court recognized that private litigation is a crucial element in the congressional scheme for the enforcement of the civil rights laws. "When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law" (390 U.S. at 401). The Court characterized private plaintiffs seeking to obtain relief under the 1964 Act as " 'private attorney[s] general,' vindicating a policy that Congress considered of the highest priority" (*id.* at 402).[8] *Newman* arose under Title II of the 1964 Act—specifically, 42 U.S.C. 2000a–3(b)—which the language of Section 706(k) tracks exactly that the "court, in its discretion, may allow the prevailing party * * * a reasonable attorney's fee." Contrary to what petitioner suggests should be done here, the

[8] See, also, *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 211; *Northcross* v. *Memphis Board of Education, supra,* 412 U.S. at 428.

Court in *Newman* approached the question of standards with particular attention to the fact that the primary purpose of the statute in encouraging private enforcement required that prevailing plaintiffs "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust" (390 U.S. at 402).

While the legislative history of Section 706(k) is sparse, it indicates that that Section's role in Title VII of the Civil Rights Act was not intended to be different from the function of the identical fee provisions in Title II to support the enforcement efforts of private attorneys general. Congress has consistently recognized that "most title VII complainants are by the very nature of their complaint disadvantaged." S. Rep. No. 92-415, 92d Cong., 1st Sess., p. 17 (1971). Senator Humphrey, a principal sponsor of the 1964 Act, said with reference to the fee award provision in Title VII: "This should make it easier for a plaintiff of limited means to bring a meritorious suit" (110 Cong. Rec. 12724 (1964)).

The courts of appeals have been uniform in applying the rule that prevailing plaintiffs should ordinarily receive a fee award under Section 706(k) "to make sure that Title VII works." *Johnson* v. *Georgia Highway Express, Inc.*, 488 F. 2d 714, 716 (C.A. 5). See *Parker* v. *Califano*, C.A.D.C., No. 76-1416, decided June 30, 1977; *Grubbs* v. *Butz*, 548 F. 2d 973, 975 (C.A.D.C.); *Robinson* v. *Lorillard Corporation*, 444 F. 2d 791, 804 (C.A. 4), certiorari dismissed, 404 U.S. 1006; *Parham* v. *Southwestern Bell Telephone Co.*, 433 F. 2d 421, 429-430 (C.A. 8); *Rosenfeld* v.

Southern Pacific Company, 519 F. 2d 527 (C.A. 9); *Carrion* v. *Yeshiva University*, 535 F. 2d 722 (C.A. 2). Any doubt that the district courts should ordinarily make fee awards to plaintiffs to effectuate the private enforcement of Title VII was put to rest by this Court's statement in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 415 (emphasis supplied):

> There is, of course, an equally strong public interest in having injunctive actions brought under Title VII, to eradicate discriminatory employment practices. * * * [T]his interest can be vindicated by applying the *Piggie Park* standard to the *attorneys' fees* provision of Title VII, 42 U.S.C. § 2000e-5(k), see *Northcross* v. *Memphis Board of Education*, 412 U.S. 427, 428 (1973).

Petitioner and *amici* argue strenuously that *Newman* v. *Piggie Park* requires that fee awards should be made in the ordinary case to successful defendants. But this Court's treatment of the question in *Newman* and *Albemarle* did not purport to establish a standard applicable to both plaintiffs and defendants. Indeed, the rationale of *Newman* simply does not apply to awards to defendants; the "prevailing defendant seeking an attorney's fee does not appear before the court cloaked in a mantle of public interest." *United States Steel Corporation* v. *United States*, 519 F. 2d 359, 364 (C.A. 3). A successful defendant does not act as a "private attorney general," and does not vindicate the Title VII policy prohibiting employment discrimination. As the court of appeals stated, "these policy consideration which support an award of fees to a prevailing plaintiff are not present in the case of a prevailing defendant" (Pet. App. 7-A).

Indeed, the prospect of routine conferral of such awards on prevailing defendants would serve to discourage the very enforcement efforts that Section 706(k) was intended to promote (see p. 17, 23–24, *infra*). Accordingly, since a rule ordinarily awarding a fee to a Title VII defendant based simply on the fact of success in litigation would not effectuate, and indeed would disserve, the incentive-to-enforcement purpose of the counsel fee provision, and since Congress plainly intended that fee awards be available to defendants as well as plaintiffs, the rationale for fee awards to defendants must be based on an alternative statutory purpose.

C. THE AWARD OF FEES TO SUCCESSFUL DEFENDANTS WHEN LITIGATION HAS BEEN INITIATED IN BAD FAITH EFFECTUATES SECTION 706(k)'S PURPOSE TO DISCOURAGE FRIVOLOUS TITLE VII LITIGATION.

The fee award authorization in Section 706(k) had a dual purpose. The Court of Appeals for the District of Columbia Circuit reviewed the applicable legislative history in *Grubbs* v. *Butz*, 548 F. 2d 973, 975, and concluded:

> From the Senate debate on the Mansfield-Dirksen amendment * * * two purposes for § 706(k) emerge. First, Congress desired to "make it easier for a plaintiff of limited means to bring a meritorious suit," * * *. * * * But second, and equally important, Congress intended to "deter the bringing of lawsuits without foundation" by providing that the "prevailing party"—be it plaintiff or defendant—could obtain legal fees.

That the purpose of including successful defendants in the fee award authorization was limited to discouraging frivolous litigation is apparent in the legislative history reviewed by petitioner (Br. 6) and *amicus* (Chamber Br. 8–9). Senator Pastore stated explicitly that "[t]he purpose of this provision in the modified substitute is to discourage frivolous suits." 110 Cong. Rec. 14214 (1964). Senator Lausche concurred, stating "that language was inserted in the bill to deter the bringing of lawsuits without foundation." 110 Cong. Rec. 13668 (1964).[9] Finally, Senator Humphrey stated that allowing a reasonable attorney's fee "will obviously operate to diminish the likelihood of unjustified suits being brought." 110 Cong. Rec. 6534 (1964).

To serve the twin goals of the fee award statute by penalizing frivolous litigation without chilling the efforts of private attorneys general, the courts have applied what the court of appeals termed the "good faith" standard (Pet. App. 8–A). The seminal case in this line is *United States Steel Corporation* v. *United States*, 519 F. 2d 359 (C.A. 3), which affirmed the refusal of the district court to award fees to a defendant which had successfully resisted an Equal Employment Opportunity Commission demand for documents. The district court had stated " 'there is nothing to indicate that the demand for access was brought to harass, embarrass or abuse * * * nor can we say [the EEOC's] action was unfounded, meritless, frivo-

[9] Senator Miller made a slightly different point relating to fee awards to plaintiffs; he stated that "ambulance chasing would be rather futile if the case were not meritorious and if the party lost, because as the bill now provides, the attorney's fee is good only to the prevailing party." 110 Cong. Rec. 14214 (1964).

lous or vexatiously brought'" (519 F. 2d at 363). The court of appeals ruled that it was "unable to conclude that the district court abused its discretion in deciding not to award an attorney's fee in this case" (*id.* at 365). In *Carrion* v. *Yeshiva University*, 535 F. 2d 722 (C.A. 2), the court of appeals upheld an award to a successful defendant, stating that such awards should be permitted "not routinely, not simply because he succeeds, but only where the action brought is found to be unreasonable, frivolous, meritless or vexatious." (*Id.* at 727). Similarly, an award in favor of a defendant was upheld in *Van Hoomissen* v. *Xerox Corp.*, 503 F. 2d 1131 (C.A. 9), where an appeal by the EEOC was judged "vexatious and prosecuted on highly questionable grounds" (unpublished order quoted at Pet. App. 8–A).

With two exceptions,[10] the courts of appeals have

[10] In *United States* v. *Allegheny-Ludlum Industries, Inc.*, 558 F. 2d 742 (C.A. 5), the Court of Appeals for the Fifth Circuit held that in awarding fees, the same standards should be applied to plaintiffs and defendants. This holding is inconsistent with the rule announced by the same circuit in *Bolton* v. *Murray Envelope Corp.*, 553 F. 2d 881, and a petition for rehearing *en banc* has been filed.

In *Equal Employment Opportunity Commission* v. *The Bailey Co., Inc.*, C.A. 6, No. 76–1045, decided September 20, 1977, the Court of Appeals for the Sixth Circuit held that the "plain language" of Section 706(k) precludes the application of a different standard to prevailing defendants from that applied to prevailing plaintiffs (slip op., pp. 28–32)—in other words, that the plain language of that Section precludes the interpretation previously adopted by most courts of appeals. The court's opinion in that case makes no reference to the statement in a prior opinion by a different panel of that court that that Section's "authorization [of a fee

accordingly held that a prevailing defendant in Title VII litigation, whether initiated by the Equal Employment Opportunity Commission or by a private plaintiff, is entitled to an award of attorney's fees only upon a finding that the action was brought in bad faith or vexatiously. See, in addition to the decision below, *United States Steel Corporation* v. *United States, supra; Van Hoomissen* v. *Xerox Corp., supra; Carrion* v. *Yeshiva University, supra; Bolton* v. *Murray Envelope Corp.*, 553 F. 2d 881, 884, n. 2 (C.A. 5); *Grubbs* v. *Butz*, 548 F. 2d 973, 975–976 (C.A.D.C.); *Wright* v. *Stone Container Corp.*, 524 F. 2d 1058, 1063–1064 (C.A. 8); *Richardson* v. *Hotel Corp. of America*, 332 F. Supp. 519, 522 (E.D. La.), affirmed, 468 F. 2d 951 (C.A. 5).

Contrary to *amicus* contention (EEAC Br. 13; Chamber Br. 21-22), in practical application the good faith standard is not completely subjective. For example, in the instant case the court of appeals affirmed the finding of good faith only after assuring itself that the issue litigated by the Commission unsuccessfully was one "of first impression requiring judicial resolution" (Pet. App. 9–A), and after the district

award• to a prevailing defendant] is designed to insure that the EE•C does not commence groundless actions." *Equal Employment Opportunity Commission* v. *MacMillan Bloedel Containers, Inc.*, 503 F. 2d 1086, 1096. Moreover, the court in *Bailey* recognized (slip op., p. 32) that "Congress was aware and approved of the double standard in the award of attorneys' fees under Title VII and intended that result with respect to the 1976 Attorney's Fee Act, although written like § 706(k) of Title VII * * *." See *infra*, pp. 26–30.

court had found the Commission's suit to be neither "unreasonable or meritless" (Pet. App. 2–A)." In making good faith determinations in other cases, the courts have referred to the objective context in which the litigation arose, including any prior litigation of the same issue (*Carrion* v. *Yeshiva University, supra,* 535 F. 2d at 728), the duty of the Commission to advance Title VII policies (*Equal Employment Opportunity Commission* v. *Children's Hospital of Pittsburgh,* 556 F. 2d 222, 224 (C.A. 3)), and the educa-

" The Commission argued that in Section 14 of the Equal Employment Opportunity Act of 1972 (see *supra* p.) Congress had empowered the Commission to institute suit based upon any charge filed with the Commission prior to March 24, 1972, as long as the Commission had found reasonable cause to believe that the respondent was guilty of unlawful employment practices but had been unable to resolve the suit through conciliation. Since it was hoped that at least some companies that had previously refused to conciliate would change their minds with the enactment of the 1972 Amendments, the Commission took the view that charges as to which no private suit had been brought remained pending before the Commission even though conciliation had failed. This view was consistent with legislative history suggesting that the Commission should not ignore employment situations which it had earlier determined to be discriminatory and which apparently remained in effect in March 1972. See Legislative History of the Equal Employment Opportunity Act of 1972, prepared by the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 2d Sess. 1851 (Committee Print, 1972). When the Commission initiated this action, there had been no Supreme Court case interpreting Section 14, and neither petitioner nor *amici* challenge the determinations of both the district court and the court of appeals that the Commission's action satisfied the good faith test. In any event, the "seasoned and wise" rule of this Court is that in the absence of an "exceptional showing of error," the concurrent findings of two lower courts will be considered final. *Comstock* v. *Group of Institutional Investors,* 335 U.S. 211, 214.

tion of the plaintiff (*Kutska* v. *California State College,* C.A. 3, No. 76–1958, decided July 15, 1977, slip op., p. 8." Thus, the application of the good faith standard by the courts takes cognizance of the entire factual and legal fabric of the litigation in order fully to implement the congressional goals "to encourage responsible litigation but to discourage baseless or frivolous actions" *Carrion* v. *Yeshiva University, supra,* 535 F. 2d at 727.

Petitioner (Br. 8) and *amici* (EEAC Br. 6; Chamber Br. 11) claim that limiting fee awards to defendants who were harassed by frivolous litigation is inconsistent with the congressional decision to award fees to "prevailing parties," rather than to "prevailing plaintiffs" as in an earlier draft of the bill, and with the recognition in *Newman* v. *Piggie Park, supra,* that prior to the passage of the 1964 Civil Rights Act, the courts had equitable power to make fee awards against plaintiffs who initiated litigation in bad faith. The legislative history does not reveal the precise reason for the change in the bill's language. See *Grubbs* v. *Butz, supra,* 548 F. 2d at 976, n. 14. But petitioner's argument fails to appreciate that regardless of what equitable powers the courts may have had prior to the passage of the statute, there was a substantial danger

" Similarly, when applying the traditional equitable exception permitting an award of attorney's fees against a bad faith litigant, the courts have considered objective factors indicating the presence or absence of bad faith. See *Hall* v. *Cole,* 412 U.S. 1, 15; *Runyon* v. *McCrary,* 427 U.S. 160, 183–184 (using the term "irresponsible conduct"); *Huecker* v. *Milburn,* 538 F. 2d 1241, 1245, n. 9 (C.A. 6); *Adams* v. *Carlson,* 521 F. 2d 168, 170 (C.A. 7).

that after its passage, the courts would view their fee powers in the cases to which it applied as limited to the statute's specific terms. For example, in *Byram Concretanks, Inc.* v. *Warren Concrete Products Company of New Jersey*, 374 F. 2d 649, 651 (C.A. 3), the court denied a prevailing defendant attorney's fees even after finding that plaintiff's "suit was baseless and not properly grounded under the Anti-Trust statutes" because the Clayton Act, 15 U.S.C. 15, authorized an attorney's fee award only to persons who had successfully asserted antitrust claims. Thus the congressional authorization of awards to prevailing defendants was necessary in order to protect the continuing availability of the award against bad faith litigation.

Contrary to petitioner's contention, nothing in *Newman* v. *Piggie Park Enterprises, supra*, suggests a different conclusion; the Court there explicitly recognized that one goal of the statute was to discourage bad faith litigation. It stated, "Congress therefore enacted the provision for counsel fees" to encourage private enforcement, "not simply to penalize litigants who deliberately advance arguments they know to be untenable." 390 U.S. at 402. Finally, while petitioner argues that it is difficult to believe that Section 706(k) merely enacted into legislation the equitable powers of the courts to penalize bad faith litigation, no concern other than frivolous litigation is expressed in the legislative history it cites.

D. THE ALTERNATIVE STANDARDS PROPOSED BY PETITIONER AND *AMICI* ARE INCONSISTENT WITH THE LEGISLATIVE HISTORY AND PURPOSES OF TITLE VII AND WITH THE SUBSEQUENT EXPLICIT APPROVAL BY CONGRESS OF THE GOOD FAITH STANDARD.

Petitioner and *amici* (Pet. Br. 10; EEAC Br. 8–11; Chamber Br. 13–20) argue that prevailing defendants should routinely be awarded fees on the same basis as are prevailing plaintiffs under the rule approved in *Newman* v. *Piggie Park Enterprises, supra*. As previously noted, nothing in *Newman's* language or logic supports that conclusion. The Court's entire analysis focused on plaintiffs alone, and the private attorneys general rationale on which it relied does not apply to successful defendants. Indeed, awarding fees routinely to successful defendants would thwart the primary purpose of Section 706(k) to serve as an incentive to effective enforcement of Title VII through litigation. "A routine allowance of attorney fees to successful defendants in discrimination suits might effectively discourage suits in all but the clearest cases, and inhibit earnest advocacy on undecided issues." *United States Steel Corporation* v. *United States, supra*, 519 F. 2d at 364–365.[13]

[13] In a brief *amicus curiae*, the National Chamber Litigation Center suggests that constitutional considerations require the application of the same standard in awarding attorney's fees (Br. 20–21). Plaintiffs and defendants, however, are not similarly situated persons. Congress has recognized that private Title VII plaintiffs and defendant employers do not have the same resources (S. Rep. No. 92–415, 92d Cong., 1st Sess., p. 17 (1971)), and this Court has upheld the constitutionality of statutes awarding attorney's fees only to prevailing plaintiffs on the basis of the differing litigation burdens born by plaintiffs and defendants. See *Missouri, Kansas & Texas Railway Company of Texas* v. *Cade*, 233 U.S. 642, 650.

Not only would such a rule deter private plaintiffs from playing the private attorneys general role that *Newman* recognized as central to the scheme of the 1964 Civil Rights Act, but it would also hinder the Equal Employment Opportunity Commission's performance of the enforcement role assigned to it by the 1972 Amendments. Congress knew that the Commission's resources were severely limited in comparison with the magnitude of the national objective of eradicating employment discrimination. *Occidental Life Insurance Co.* v. *Equal Employment Opportunity Commission,* No. 76–99, decided June 20, 1977, slip op., p. 9. In the absence of any supportive language or legislative history, it would be inconsistent with the remedial goals of Title VII to create an attorney's fee rule that would further burden good faith enforcement by the Commission.[14] Such fee awards against the Commission would be especially anomalous because Section 706(k) authorizes fee awards only to a "prevailing party, other than the Commission," and therefore the Commission cannot recover attorney's fees as plaintiff. Thus, whatever the merits of petitioner's argument (Br. 10–11) that equality of treatment demands that the same standard be applied in awarding attorney's fees to both prevailing defendants and prevailing private plaintiffs, it has no application

[14] The Comptroller General has ruled that agencies—such as the Equal Employment Opportunity Commission—which have been authorized by Congress to bring enforcement actions are required to pay their own litigation expenses. See 46 Comp. Gen. 98, 100

where the Commission is the unsuccessful plaintiff.[15]

Amici (EEAC Br. 15–20; Chamber Br. 14–17) seek to support a liberal standard for fee awards to successful defendants by citing the high cost of litigation.[16] and the alleged advantages of fee awards, including

(1966); 38 Comp. Gen. 343, 344–345 (1958). Also, pursuant to 31 U.S.C. 484, the Comptroller General has ruled that where agencies have successfully brought enforcement actions and have recovered costs, such monies are transferred to the Treasury's general fund, not the account of the agency. 47 Comp. Gen. 70, 72 (1967).

Consistent with these rulings, the Equal Employment Opportunity Commission has paid awards for attorney's fees to prevailing defendants from unexpended funds allocated to its legal program, and has returned costs recovered in successful enforcement actions to the Treasury's general fund.

[15] The EEAC argues that routine allowance of attorney's fees to prevailing defendants would not discourage the Equal Employment Opportunity Commission from bringing suit because the Commission has a statutory duty to bring enforcement actions (Br. 9). The Commission's authority to bring suit upon completion of its duty to conciliate is, however, discretionary (*Occidental Life Insurance Co.* v. *Equal Employment Opportunity Commission, supra*, slip op., p. 9, n. 18) and as a practical matter its exercise is a function of the resources made available to the Commission.

[16] *Amicus curiae* Equal Employment Advisory Council argues that many Title VII defendants are small businesses and that considerations of fairness require that such employers be awarded attorneys' fees on a routine basis (Br. 18). Congress, however, specifically rejected such protection for small businesses by eliminating a Senate amendment which would have mandated the award of attorney's fees to small employers. S. Rep. No. 92–681, 92d Cong., 2d Sess., p. 19 (1972). Congress instead provided protection to small businesses by exempting businesses with less than 15 employees from the coverage of Title VII (see Section 701(b) of Title VII, 42 U.S.C. 2000e(b), even though it was aware that "small establishments have frequently been the most flagrant violators of equal employment opportunity" and even though, for this reason, it had originally been proposed that the exemption be limited to businesses with less than eight employees. S. Rep. No. 92–415, 92d Cong., 1st Sess., p. 8 (1971).

checking "our ever expanding bureaucracy" and protecting the benefits of a company's employees. Nothing in the legislative history suggests that any of these claimed advantages of fee shifting were considered by Congress or were intended to be implemented by Section 706(k). Nor is there any indication that Congress intended that fee shifting would be justified simply because under the American rule the defendant in litigation, whether successful or unsuccessful, must ordinarily bear what may often amount to large litigation costs. Fee shifting was discussed by Congress only in the context of either an incentive to private plaintiffs or a discouragement to frivolous suits. To permit awards for other purposes would therefore be improper, since "the range of discretion of the courts in making those awards are matters for Congress to determine." *Alyeska Pipeline Service Co.* v. *Wilderness Society, supra,* 421 U.S. at 262.

Moreover, the claim that the language of Section 706(k) requires a single standard of fee awards is inconsistent with Congress's subsequent use of similar language accompanied by explicit congressional adoption of the standards applied by the court of appeals below. The Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, amending 42 U.S.C. 1988, like Section 706(k), states that "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of costs." [17]

[17] The Civil Rights Attorney's Fees Awards Act authorizes the courts to exercise discretion in awarding attorney's fees to prevailing parties in actions *inter alia*, under 42 U.S.C. 1981 which, like Title VII, prohibits discrimination in private employment on the basis of race. *Johnson* v. *Railway Express Agency*, 421 U.S. 454.

The Senate Judiciary Committee's report declared (S. Rep. No. 94–1011, 94th Cong., 2d Sess., pp. 4–5) (1976) (emphasis supplied):

> *It is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act.* A party seeking to enforce the rights protected by the statutes covered by S. 2278, if successful, "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Newman* v. *Piggie Park Enterprises, Inc.,* 390 U.S. 400, 402 (1968). Such "private attorneys general" should not be deterred from bringing good faith actions to vindicate the fundamental rights here involved by the prospect of having to pay their opponent's counsel fees should they lose. * * * *Such a party, if unsuccessful, could be assessed his opponent's fee only where it is shown that his suit was clearly frivolous, vexatious, or brought for harassment purposes. United States Steel Corp.* v. *United States,* 385 F. Supp. 346 (W.D. Pa. 1974), aff'd [519 F. 2d 359] (3rd Cir. 1975). This bill thus deters frivolous suits by authorizing an award of attorneys' fees against a party shown to have litigated in "bad faith" under the guise of attempting to enforce the Federal rights created by the statutes listed in S. 2278. * * * [Footnotes omitted; emphasis supplied.]

The House Judiciary Committee's report stated (H.R. Rep. No. 94–1558, 94th Cong., 2d Sess., pp. 6–7 (1976)):

> [T]he courts have developed a different standard for awarding fees to prevailing defendants

because they do "not appear before the court cloaked in a mantle of public interest." *United States Steel Corp.* v. *United States,* 519 F. 2d 359, 364 (3rd Cir. 1975). As noted earlier such litigants may, in proper circumstances, recover their counsel fees under H.R. 15460. To avoid the potential "chilling effect" * * * and to advance the public interest articulated by the Supreme Court, however, the courts have developed another test for awarding fees to prevailing defendants. Under the case law, such an award may be made only if the action is vexatious and frivolous, or if the plaintiff has instituted it solely "to harass or embarrass" the defendant. *United States Steel Corp.* v. *United States, supra* at 364. If the plaintiff is "motivated by malice and vindictiveness," then the court may award counsel fees to the prevailing defendant. *Carrion* v. *Yeshiva University,* 535 F. 2d 722 (2d Cir. 1976). Thus if the action is not brought in bad faith, such fees should not be allowed. See, *Wright* v. *Stone Container Corp.* 524 F. 2d 1058 (8th Cir. 1975); see also, *Richardson* v. *Hotel Corp. of America,* 332 F. Supp. 519 (E.D. La. 1971), *aff'd without published opinion,* 468 F. 2d 951 (5th Cir. 1972). This standard will not deter plaintiffs from seeking relief under these statutes, and yet will prevent their being used for clearly unwarranted harassment purposes.[18]

[18] Congress intended that the bad faith standard governing the discretionary award of attorney's fees to prevailing defendants should be applicable to government enforcement litigation. The Civil Rights Attorney's Fees Awards Act of 1976 contains a provision which authorizes a court to award attorney's fees to a prevail-

Congress considered providing attorney's fees only to a prevailing plaintiff, but, relying on judicial decisions holding that a prevailing defendant is entitled to a discretionary award of fees only upon a finding of bad faith, it adopted language similar to that of Section 706(k) of Title VII. See H.R. Rep. No. 94–1558, 94th Cong., 2d Sess., p. 6 (1976).[19] While this legislative

ing defendant in an action by the United States to recover unpaid taxes. In awarding such fees to a prevailing taxpayer, Senator Kennedy stated that "awards are appropriate where * * * the plaintiff, the Government, acted in a frivolous or vexatious manner or brought the suit for purposes of harassment." 122 Cong. Rec. S17050 (daily ed., September 29, 1976).

[19] If the issue were the initial interpretation of Section 706(k), a strong argument could be made that Congress did not, in 1964, intend to permit the award of attorney's fees against the government any more than it permitted such awards in favor of the government.

Section 707(h) of H.R. 7152, as passed by the House of Representatives, provided only that "the Commission shall be liable for costs the same as a private person." H.R. Rep. No. 914, 88th Cong., 1st Sess., p. 13 (1963). Such a provision was required because, at the time Title VII was enacted, the United States was not ordinarily liable for costs when it brought suit. See the statement of Senator Humphrey explaining a similar provision in the House version of Titles III and IV, Civil Rights Act of 1964, 78 Stat. 246, (110 Cong. Rec. 6543 (1964)). Compare 62 Stat. 973 with 80 Stat. 308, amending 28 U.S.C. 2412 in 1966 to authorize the recovery of costs from the United States. The term "costs," however, does not include attorney's fees. See 28 U.S.C. 2412.

A provision authorizing the award of attorney's fees first appeared in the Dirksen-Mansfield amendment introduced on the Senate floor. 110 Cong. Rec. 11933 (1964). As explained by Senator Humphrey: "This should make it easier for a plaintiff of limited means to bring meritorious suits. The provision for the taxing of costs against the Commission and the United States is similar to that in section 707(h) of the House bill." 110 Cong. Rec. 12724 (1964). Senator Humphrey's analysis indicates that Congress may

history of a subsequently enacted statute indicating Congress' careful review and adoption of the prevailing interpretation of Section 706(k) may not merit the weight given to contemporaneous statements, it is nevertheless "entitled to careful consideration 'as a secondarily authoritative expression of expert opinion,'" *Parker* v. *Califano, supra,* slip op., pp. 41–42; see *Red Lion Broadcasting Co.* v. *Federal Communications Commission,* 395 U.S. 367, 379–381. The interpretative value of that history is increased here since the language of the subsequent enactment "tracks the language of the counsel fee provisions of Titles II and VII of the Civil Rights Act of 1964" (H.R. Rep. No. 94–1558, *supra,* at p. 5), and because Congress indicated so clearly that it intended that the "standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act." S. Rep. No. 94–1011, *supra,* at p. 4. Since the legislative history and statutory purposes of Section 706(k) (see p. 12, *supra*) support, rather than contradict, the interpretation of that section that has been adopted by the majority of the courts of appeals and by Congress, that interpretation should be sustained.

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have intended that only "costs," not attorney's fees, be awarded prevailing defendants in government litigation.

Since Congress, however, has adopted the interpretation of the courts of appeals that attorney's fees may be assessed against the government in situations of bad faith, we are not urging a different position here.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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